Oyombe v Ofwa & another (Civil Appeal E073 of 2022)
[2024] KEHC 9289 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9289 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E073 OF 2022

BM MUSYOKI, J

JULY 31, 2024

BETWEEN

GEDION ODHIAMBO OYOMBE ..... APPELLANT

AND

THOMAS OMOLLO OFWA ..... 1ST RESPONDENT

NATIONAL HOUSING CORPORATION ..... 2ND RESPONDENT

(Being an appeal from judgement and decree of Honourable Hon. Bernard Kasavuli PM dated 19-05-2022 in Mavoko Chief Magistrate Court civil case no. E213 of 2021)

JUDGMENT

1. The appellant sued the respondents in Mavoko Chief Magistrate's civil case number E213 of 2021 claiming general and special damages arising from an accident which occurred on 6-12-2020 involving himself and motor vehicle registration number KCJ 890Z which was said to belong to the 2nd respondent and driven by the 1st respondent. After a full hearing the honourable magistrate found that the appellant had not proved liability against the respondents and proceeded to dismiss the suit with costs but assessed general damages at Kshs 100,000.00.

2. The appellant being aggrieved by the decision of the trial court has filed this appeal raising the following grounds;

    1. That the learned magistrate erred in law and fact in failing to find the respondent liable for causing the accident at all.

    2. The learned magistrate erred in law and fact by failing to appreciate and consider the evidence adduced by the appellant.

3. The learned magistrate erred in law and in fact in not giving sufficient consideration to the weight of evidence by the appellant.

4. That the learned magistrate erred in law and fact in failing to appreciate that the appellant was not to be blamed for the accident.

5. That the learned magistrate erred in law and in fact in dismissing the suit without determining the real issues in dispute.

6. That the learned magistrate erred in law and fact in failing to consider the plaintiff's submissions and authorities in making a finding on liability.

7. The whole judgment on liability was against the weight of evidence before the court.

3. It is clear from the above grounds that the only issue for determination in this appeal is whether or not the magistrate was right in failing to find the respondents liable and to what extent. In the memorandum of appeal, the appellant has not questioned the magistrate's assessment of damages although he has made submissions on quantum.

4. This is a first appeal and I am obligated to re-evaluate and re-examine evidence produced in the trial court and come to my own independent conclusion. However, I should bear in mind that I did not have the advantage of hearing the evidence first hand or observing the demeanour of the witnesses. In Bwire vs Wayo & Sailoki (2022) KEHC 7 (KLR) it was held that;

> 'A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgement and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.'

5. The appellant told the court that on 6-12-2020 he was walking along Mombasa-Nairobi highway when near where he called Safaricom area in Athi River motor vehicle registration number KCJ 890Z which was being driven at high speed and in a reckless and careless manner knocked him down. He blamed the driver of the motor vehicle. According to him he was off the road on the left side.

6. In cross examination, he stated that he was crossing the road and was knocked when he was waiting for motor vehicles to pass. He admitted that there was no zebra crossing on the site and denied that there were guard rails at the scene. He maintained that he was knocked while off the road. He stated that he did not see the motor vehicle coming and therefore he was not able to avoid the accident. He finished by stating that the driver was overtaking.

7. The 1st respondent testified and told the court that he was an employee of the 2nd respondent and on the material day, he was driving motor vehicle registration number KCJ 890Z which he had bought by loan from the 2nd respondent. He stated that he was driving to Lukenya for a retreat when the accident occurred on a bridge. According to him, there were guard rails which were to prohibit people coming on the road. He stated that the plaintiff suddenly jumped over the guard rails at close range of about 5 meters and bumped into his car. He said that a rowdy crowd started gathering and for safety reasons, he drove to the nearest manned junction about 300 metres ahead and reported to the police manning the junction. He drove back with a Corporal Mugi and found the appellant had been taken to hospital. According to him, he was driving at a speed of 50 kilometers per hour. He maintained that there was a foot path where pedestrians were expected to walk along. He added that he applied emergency brakes, slowed down and swerved to avoid the accident. He blamed the appellant for the accident.

8. In cross examination, he told the court that the traffic was moderate and visibility was okay. He also stated that the area was not a buildup area. He maintained that he stopped after the accident and that the pedestrian was not at the scene when he came back with Mr. Mugi. He admitted that he had not produced photographs or inspection report. In re-examination, he stated that there was no time to take photographs and they would not have added value to the case.

9. After analyzing the evidence of the parties, the honourable magistrate found that the appellant was 100% to blame for the accident. I find the following excerpt of the magistrate's judgment most relevant to the issue before me;

> 'I am of the view that it was necessary for the plaintiff to call the investigating officer or any other officer to explain the circumstances of the accident in order to corroborate his account of how the accident occurred. At the moment, there is rival evidence on record on how the accident occurred but there is no dispute that the scene where the accident occurred is not a designated area for pedestrians to cross the road. The driver testified that it was a scene with guard rails on both sides of the road and that it was the plaintiff who jumped over to the road. Without the evidence of an independent witness, it is not possible to disbelief the driver's description of the scene and how the accident occurred.

10. In view of the above rival eye witness account on how the accident occurred, I am more inclined to believe the testimony of the driver that the plaintiff jumped over the guard rails to the road thus placing himself at peril. The plaintiff must surely be held 100% liable for this accident in issue.'

11. The above statement appears to me as the main influencer of the decision of the magistrate on liability. It is true that none of the parties called an independent witness. To me, the evidence on record is word of one party against the other's. The magistrate did not state why he found it difficult to disbelief the 1st respondent. He also did not say why he disbelieved the appellant. It is my position that it was not enough for the magistrate to say that he believed one party over the other. He should have stated the reason that made him find one version believable than the other. The court did not state that it knew the scene in order to make it believe that there were guard rails. The fact that the area was not a designated crossing place does not automatically translate to 100% negligence against the appellant. Zebra crossings and designated crossing areas signages are not placed to totally ban pedestrians from crossing roads but for purposes of enhancing safety of the roads users. The fact that there was a crowd which made the 1st respondent feel unsafe for him to stop, means that there were people nearby and the scene was not in an isolated area. According to the 1st respondent, the police were 300 meters away and by the time they came back the appellant had been taken to hospital. To me, that is an indication that the area was populated.

12. The occurrence of the accident is not disputed. It is also not disputed that the victim of the accident was the appellant. I hold the position that where an accident has happened, someone must be responsible for it and where the court has not been supplied with concrete evidence to place blame on either of the parties involved, the court would be justified to apportion liability equally. I do believe that this is such a case. I have not seen anything in the proceedings that would convince me that either of the parties was more negligent than the other. I am aware that the court had advantage of seeing the demeanor of the witnesses but the court is bound to record the reason for his source of belief and where the court fails to do so, an appellate court is justified in reaching its own independent conclusion.

13. The appellant has referred me to the authority of Berckey Steward Ltd & Others vs Lewis Kimani Waiyaki (1882-88) KAR 118, Baker vs Market Hark Burough Industrial Co-operative Society Ltd (1953) 1WLR and Hussein Omar Farah vs Lento Agencies (2006) eKLR but he did not find it wise

to favour this court with copies of the judgements. In his submissions, though he does not come out clear about it, the appellant seems to be asking this court to apportion liability equally.

14. The respondents have in their submissions asked me to find that the appellant had given contradictory evidence on how the accident occurred. I have gone through the evidence of the appellant and in my view, whatever contradictions may be there are immaterial. The fact remains that the appellant was knocked while in an exercise to cross the road. Whether he was waiting to cross or he jumped over the guard rails is what was in contest and to which there was no concrete evidence on either side.

15. I have sought guidance from the following authorities;

    a. Salmin Mbarak Awadhi v Emma Nthoki Mutwota (2017) eKLR where the court was faced with two versions of how the accident occurred. In apportioning liability equally, the Honourable Justice C. Kariuki held that

> 'The evidence by the plaintiff and the defence was conflicting o the correct version of the happenings of the accident. The fact remains that the victim was knocked by the appellant motor vehicle as admitted but the court was not convinced on each sides stories on the actual happening of the accident and thus found the same not credible leaving the court with no option but to blame both sides equally.'

    b. Stephen Obure Onkanga v Njuca Consolidated Limited (2013) eKLR where the Court of Appeal when faced with similar situation held that;

> 'Accordingly, in the instant appeal, as there was no concrete evidence to distinguish between the blameworthiness or otherwise of the appellant or the respondent, both should be held equally to blame.'

16. In view of the above, I find and hold that the appellant shall shoulder 50% liability while the respondents shall jointly and severally shoulder 50%.

17. The appellant has made submissions on quantum and asked this court to award general damages of Kshs 600,000.00. In the beginning of this judgment, I had stated that the appeal was on liability only. None of the grounds of appeal bespeak of quantum. I will not delve into the issue of quantum as the same is not raised in the appeal. Doing so will be prejudicial to the respondents who have limited their submissions on the issue of liability only which was obviously as a result of what the grounds of appeal had raised. I will also be going against the clear provisions of Order 42 Rule 4 which provides that;

> 'The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in the deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule.
>
> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.'

18. The appellant did not seek the leave of the court to advance arguments on the quantum. In the circumstances, the quantum of damages remains as assessed by the trial court in its judgment which was Kshs 100,000.00 and the pleaded special damages.

19. In conclusion, the judgment of the court in Mavoko Chief Magistrate's Court civil case number E213 dated 19th May 2024 is set aside and substituted for judgment for the appellant against the respondents jointly and severalty for;

    a. Lianility 50%.

    b. Kshs 100,000.00 for general damages for pain and suffering and loss of amenities.

    c. Kshs 3,550.00 for special damages.

    d. Costs of the suit in the lower court and in this appeal.

    e. Interest on (a) and (b) above at court rates from the date of judgment of the trial court until payment in full.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered presence of;

Miss Keta for the appellant; and

Miss Mwaura for the respondent.